

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

**ATLANTIC CITY ELECTRIC COMPANY,**

**Employer,**

**and**

**INTERNATIONAL BROTHERHOOD OF  
ELECTRICAL WORKERS, LOCAL 210,**

**Petitioner.**

**Case No. 04-RC-221319**

**ATLANTIC CITY ELECTRIC COMPANY'S BRIEF ON REVIEW OF THE  
ACTING REGIONAL DIRECTOR'S DECISION AND DIRECTION OF ELECTION**

Jonathan C. Fritts  
MORGAN, LEWIS & BOCKIUS LLP  
1111 Pennsylvania Avenue, NW  
Washington, DC 20004  
202.739.5867  
jonathan.fritts@morganlewis.com

Julia S. Sturniolo  
Andrew L. Gniewek  
MORGAN, LEWIS & BOCKIUS LLP  
1701 Market Street  
Philadelphia, PA 19103-2921  
215.963.4782/5319  
julia.sturniolo@morganlewis.com  
andrew.gniewek@morganlewis.com

Dated: January 28, 2019

*Counsel for the Employer  
Atlantic City Electric Company*

## TABLE OF CONTENTS

	Page
I. SUMMARY OF ARGUMENT .....	1
II. BACKGROUND .....	7
III. FACTS .....	8
IV. ARGUMENT .....	13
A. The Regional Director’s Decision Must Be Reversed Because System Operators Have the Authority to Assign Employees .....	13
1. The Regional Director Erred As a Matter of Fact.....	13
a. Location .....	14
b. Time.....	19
c. Significant Overall Tasks .....	20
d. Independent Judgment.....	20
2. The Regional Director Erred As a Matter of Law .....	25
B. The Regional Director’s Decision Must Be Reversed Because System Operators Have the Authority to Responsibly Direct Employees .....	31
1. The Regional Director’s Decision Cannot Stand in Light of the Record Evidence .....	31
2. The Regional Director Misapplied Existing Board Law and Applied an Overly-Narrow Construction of Accountability in Evaluating Responsible Direction.....	34
C. Compelling Reasons Support a Return to the Board’s Standard in <i>Big Rivers</i> .....	35
D. Compelling Reasons Support Abandonment of the Board’s Restrictive Principles Regarding Supervisory Status, and Adoption of Principles that Would More Fairly Reflect the Requirements of Section 2(11).....	40
V. CONCLUSION.....	43

## **TABLE OF AUTHORITIES**

	<b>Page(s)</b>
 <b>CASES</b>	
<i>Ariz. Pub. Serv. Co. v. NLRB</i> , 453 F.2d 228 (9th Cir. 1971) .....	18, 28, 33, 36
<i>Arlington Masonry Supply, Inc.</i> , 339 NLRB 817 (2003) .....	14, 16
<i>Armour &amp; Co.</i> , 40 NLRB 1332 (1942) .....	8
<i>Big Rivers Elec. Corp.</i> , 266 NLRB 380 (1983) .....	passim
<i>Buchanan Marine, L.P.</i> , 363 NLRB No. 58 (Dec. 2, 2015) (Miscimarra, dissenting).....	18, 40
<i>Cnty. Educ. Ctrs., Inc.</i> , 360 NLRB 85 (2014) .....	35
<i>D&amp;T Limousine Service, Inc.</i> , 328 NLRB 769 (1999) .....	24
<i>Entergy Mississippi</i> , 357 NLRB 2150 (2011) .....	passim
<i>Entergy Mississippi, Inc. v. NLRB</i> , 810 F.3d 287 (5th Cir. 2015) .....	passim
<i>Essbar Equip. Co.</i> , 315 NLRB 461 (1994) .....	24
<i>Globe Machine &amp; Stamping Co.</i> , 3 NLRB 294 (1937) .....	8
<i>In re Croft Metals, Inc.</i> , 348 NLRB 717 (2006) .....	31
<i>In re The Pearson Bros Co.</i> , 199 NLRB 1179 (1972) .....	16
<i>Lakeland Health Care Assocs, LLC v. NLRB</i> , 696 F.3d 1332 (11th Cir. 2012) .....	34

<i>LakeWood Health Ctr. d/b/a Chi Lakewood Health,</i> 365 NLRB No. 10 (Dec. 28, 2016) (Miscimarra, dissenting).....	passim
<i>Little Rock Hardboard Co.,</i> 140 NLRB 264 (1962) .....	24
<i>Maine Yankee Atomic Power Co.,</i> 243 NLRB 319 (1979) .....	37
<i>Me. Yankee Atomic Power Co. v. NLRB,</i> 624 F.2d 347 (1st Cir. 1980).....	37
<i>Miss. Power &amp; Light Co.,</i> 328 NLRB 965 (1999) .....	37, 38
<i>Monogahela Power Co. v. NLRB,</i> 657 F.2d 608 (4th Cir. 1981) .....	37
<i>Monongahela Power Co.,</i> 252 NLRB 715 (1980) .....	37
<i>Mountaineer Park, Inc.,</i> 343 NLRB 1473 (2004) .....	16, 18
<i>NLRB v. Detroit Edison Co.,</i> 537 F.2d 239 (6th Cir. 1976) .....	36
<i>NLRB v. Ky. River Cmty. Care, Inc.,</i> 532 U.S. 706 (2001).....	3, 22, 38, 39
<i>NLRB v. NSTAR Electric Co.,</i> 798 F.3d 1 (1st Cir. 2015).....	25, 29
<i>NLRB v. Prime Energy Ltd. P'ship,</i> 224 F.3d 206 (3rd Cir. 2000) .....	16, 17, 33
<i>NLRB v. Roselon S., Inc.,</i> 382 F.2d 245 (6th Cir. 1967) .....	16
<i>Oakwood Healthcare, Inc.,</i> 348 NLRB 686 (2006) .....	passim
<i>Ohio Power Co. v. NLRB,</i> 176 F.2d 385 (6th Cir. 1949) .....	16
<i>Pepsi-Cola Co.,</i> 327 NLRB 1062 (1999) .....	16

<i>Providence Hosp.</i> , 320 NLRB 717 (1996) .....	22, 37
<i>Public Service Co. of Colorado v. NLRB</i> , 271 F.3d 1213 (10th Cir. 2001) .....	38
<i>RCC Fabricators, Inc.</i> , 352 NLRB 701 (2008) .....	34
<i>S. Ind. Gas &amp; Elec. Co. v. NLRB</i> , 657 F.2d 878 (7th Cir. 1981) .....	37
<i>W. Penn Power Co.</i> , 143 NLRB 1316 (1964) .....	37
<i>W. Penn Power Co. v. NLRB</i> , 337 F.2d 993 (3rd Cir. 1964) .....	37
<b>STATUTES</b>	
29 U.S.C. § 152(11) .....	14
<b>OTHER AUTHORITIES</b>	
Reliability Standard PER-003-1 .....	21

On December 13, 2018, the National Labor Relations Board (“NLRB” or “Board”) granted Atlantic City Electric Company (“ACE” or the “Company”)’s Request for Review of the Acting Regional Director (“Regional Director”)’s Decision and Direction of Election dated June 15, 2018 (the “Decision”). The Board granted review with respect to whether the Company’s System Operators and Senior System Operators (collectively “System Operators”)<sup>1</sup> possess the authority to assign employees to places and responsibly direct employees using independent judgment.<sup>2</sup> ACE, pursuant to Section 102.67 of the NLRB’s Rules and Regulations, hereby submits its Brief on Review.

## **I. SUMMARY OF ARGUMENT**

The Regional Director improperly concluded that ACE had not met its burden to show that the System Operators are supervisors under Section 2(11) of the National Labor Relations Act (“Act” or the “NLRA”). The Board should reverse the Regional Director’s Decision because the record demonstrates that System Operators have the authority to assign and responsibly direct employees and exercise independent judgment in doing so. As discussed further below, the Regional Director’s findings on substantial factual issues are clearly erroneous on the record, misapply extant law, and—to the extent they could possibly be deemed to rely on existing law—present compelling reasons for reconsideration of Board policy regarding assignment and responsible direction.

**First**, the record evidence clearly establishes that the System Operators have the authority to assign ACE field crew employees. The System Operators make priority decisions

---

<sup>1</sup> Senior System Operators are primarily responsible for the transmission system (above the 69,000 voltage level) and System Operators are primarily responsible for the distribution system (below 69,000 voltage level). (Tr. 17).

<sup>2</sup> Because ACE is uncertain as to the exact scope of the review that will be undertaken by the Board, it has erred on the side of including all arguments addressed in its earlier Request for Review in this Brief on Review.

from a central control room regarding when and where the field employees' work must be performed, including what equipment can be moved offline for repairs or maintenance and which customers or locations will be serviced first. These decisions—which the System Operators can and do make without consulting any supervisor or manager—dictate the location, time, and work performed by field crew employees. Indeed, the Regional Director's own factual and credibility findings dictate the result that the System Operators are supervisors. Among other findings, the Regional Director concluded that System Operators:

- “are charged with the difficult task of directing the operation of the Employer's distribution system and protecting its integrity, taking into account concerns for both individual and societal safety and security while constantly balancing needs and risks.” (Decision, 14).
- “determine how resources are allocated, which can impact how long field employees are at a particular jobsite, and the number and types of crews dispatched.” (Decision, 10).
- “operate substations and equipment in the field, monitor the system, and make priority decisions about where to place resources, which might entail dispatching field employees from a small outage to a large outage.” (Decision, 11).
- “can call a Field Supervisor directly and request that a crew be dispatched. . . . If there is a disagreement as to whether a field crew should be assigned, System Operators have the authority to direct Field Supervisors to assign crews. . . .” (Decision, 11).
- have been disciplined for failing to bring in additional field crews. (Decision, 12).
- follow guidelines but regularly deviate from these guidelines, “often a weekly occurrence.” (Decision, 10).

Thus, the Regional Director's *own findings* compel the conclusion that System Operators are assigning and responsibly directing work using independent judgment, as discussed further below.

Despite recognizing that System Operators exercise independent judgment in making these work assignment decisions, the Regional Director instead concluded that, although System

Operators may have some downstream impact on employee assignments, System Operators ultimately have no authority to require *particular* employees to work the times, locations, or overtime assigned to them. (Decision, 14-16).<sup>3</sup> This conclusion is patently erroneous. The record evidence, for example, demonstrates that:

- System Operators have the authority to hold field crews beyond their shift and to authorize overtime by communicating directly with the field crews, without going through any other supervisor. (Tr. 159).<sup>4</sup>
- Upon the System Operator’s “say so,” additional off-duty field employees will be called in to provide additional staffing support, which can include overtime work. (Tr. 152-53).
- System Operators have the authority to assign field crews to go to a particular job or project. As one of the Union’s witnesses admitted, a System Operator can tell a “troubleman” (*i.e.*, a field employee) to go to a particular location, such as a hospital. (Tr. 241).
- System Operators can redirect specific field crews to other jobs in response to changing circumstances on the ground. (Tr. 126).
- System Operators write “switching instructions,” which are step-by-step assignments that particular field crews working on particular projects must follow in order to isolate or deenergize a piece of equipment. (Tr. 127).

Based on this and other record evidence discussed below, the Regional Director’s conclusion that System Operators have no authority to assign employees to a specific location, to reassign employees to other jobs, or to require that particular employees work overtime assigned to them is clearly erroneous on the record and should be reversed. (Decision, 15). Such a conclusion is not even internally consistent with the Regional Director’s own findings.

---

<sup>3</sup> To the extent the Regional Director used the term “professional judgment” rather than “independent judgment,” the United States Supreme Court has rejected such a distinction, as discussed further below. *See NLRB v. Ky. River Cmty. Care, Inc.*, 532 U.S. 706, 715 (2001) (“*Kentucky River*”) (“What supervisory judgment worth exercising, one must wonder, does not rest on ‘professional or technical skill or experience’?”).

<sup>4</sup> Citations to the Hearing Exhibits are labeled as “Bd.” for Board Exhibits and “E.” for Employer Exhibits. Citations to the Hearing Transcript are labeled as “Tr.” Citations to the Regional Director’s Decision are labeled as “Decision.”

The Regional Director found that System Operators make “priority decisions” about where and when to direct field crew based on their independent assessment. (Decision, 11). Yet, the Regional Director concluded that because the System Operators effectuate these assignments through field supervisors, the System Operators do not “assign” the work. (Decision, 11, 15). In reaching this erroneous conclusion, the Regional Director ignored dispositive evidence that the System Operators have the final authority to decide the location, time, and work to be performed by the field employees, even where the field supervisor may disagree. (Tr. 138; 245; 248). As Shift Manager Jay Davis testified, “[S]ystem [O]perators have that ultimate authority to say, yes, it has to get done.” (Tr. 248). Indeed, the Regional Director found that System Operators are accountable when they fail to make these assignments. (Decision, 16) (System Operator was disciplined for failing to assign a new crew to complete a nuclear reactor test).

The Regional Director inappropriately minimized this evidence when he concluded that System Operators may have some “impact” on the need for overtime, the length of a particular job, or the switching instructions used. (Decision, 16). The System Operators do not merely have an “impact” on those issues. The System Operators are the *final authority* on those issues, especially in outage or emergency situations. If a System Operator decides that a particular customer, location, or equipment is a priority, that decision alone dictates where the field crew must report to work. (Tr. 245) (explaining the System Operator has the ultimate authority to decide the priority of work). If the System Operator decides to require overtime, field employees must remain on the job. (Tr. 159). The mere fact that those directives may be communicated via a field supervisor or a dispatcher does not dilute the System Operator’s ultimate authority to determine these assignments. Moreover, the Regional Director’s efforts to avoid this conclusion by shoe-horning these facts into inapposite cases where independent judgment was lacking is, as

discussed below, a misapplication of existing Board case law. (Decision, 15). To the extent that field supervisors exercise statutory authority to “assign” employees (which is the premise of the Regional Director’s Decision), it defies logic and is contrary to the Act for the Board to conclude that employees who have *final* authority over such assignments, especially in emergencies and other critical situations, *lack* statutory “supervisor” authority.

**Second**, the Regional Director made similar material errors with respect to the System Operators’ ability to responsibly direct other ACE employees. The Regional Director, for example, ignored evidence that System Operators responsibly direct the control room dispatchers, including but not limited to the following:

- In a typical, non-outage situation, the System Operator directs the dispatcher to call the crew to go from one location to another. (Tr. 116-17; 124-25).
- The Union’s business manager *admitted* that System Operators direct the work of dispatchers. (Tr. 105) (When asked whether he understands that System Operators direct the work of dispatchers, Charles Hill admitted, “I guess I would have to”).
- Collectively-bargained job descriptions further reveal that dispatchers:
  - “Help[ ] initiate the expansion of the restoration center and the mobilization of additional workforce *under the direction of the [System Operator]*.” (E. Ex. 3, at p. 6, ¶ 1; Tr. 105) (emphasis added).<sup>5</sup>
  - “Receive[ ] and evaluate[ ] customer emergency calls, recommending or initiating corrective action *under the direction of the [System Operator]* when necessary.” (E. Ex. 3, at p. 6, ¶ 3) (emphasis added).

The System Operators not only direct the work of the dispatchers, they are also *accountable* for ensuring that those directions are actually followed. (Tr. 128). If the dispatcher cannot execute the System Operator’s instructions, for example, the System Operator is responsible for remedying the situation by obtaining additional field crew resources for the dispatcher or otherwise resolving the issue. (*Id.*).

---

<sup>5</sup> “Power System Controllers” is a legacy name for the System Operator position. (Tr. 168).

Similarly, System Operators create step-by-step switching instructions for field crews and redirect them to handle specific tasks. As the record demonstrates, the System Operators are accountable for the performance of field crew as part of the Company's performance accountability system, which takes into account reliability, safety, and cost efficiency, among other metrics. (Tr. 127). As the Decision recognizes, the System Operators conduct field audits to confirm that this "switching and tagging" work is being handled accurately. (Decision, 12; Tr. 184-86).

Despite this record evidence, the Regional Director found that the System Operators do not responsibly direct field crews because there was insufficient evidence of System Operators receiving formal discipline due to field crew errors. (Decision, 15). In so holding, the Regional Director again ignored significant record evidence that the System Operators' performance and compensation are both impacted by the performance of the field crews they direct. (Tr. 127; 186-87; 218-19; E. Ex. 9) (discussing performance reviews); (Tr. 156-57; 160-61) (discussing bonuses, which include a metric for regional/field performance). In addition, the Regional Director ignored evidence of a situation in which the field crew erred by failing to contact the System Operator before proceeding with "switching" work, which resulted in verbal coaching of the System Operator. (Tr. 192; 204; E. Ex. 10). Moreover, the Regional Director's conclusion that accountability can only be established via formal discipline is, as discussed below, contrary to extant case law.

**Third**, this case presents compelling reasons for reconsideration of an important Board rule or policy. It reveals the shortcomings in the Board's more recent decisions involving Section 2(11) authority in relation to system supervisors in the utility industry, which warrant reinstatement of the principles adopted by the Board and the courts in *Big Rivers Elec. Corp.*,

266 NLRB 380 (1983), and its progeny. Here, for example, the record is undisputed that System Operators work without a higher-level supervisor more often than not. They are in the control room 24 hours a day, 7 days a week, but higher-level supervision is present only 50-55 hours a week. (Tr. 213). It defies common sense to hold, as the Regional Director did, that there is a complete absence of supervisory authority, for the majority of each week, in the control room of a power company that serves over half-a-million customers. This result does not pass the “common sense” principles articulated by former Chairman Miscimarra, which the Board should adopt based on considerations like those presented in the instant case. *See Lakewood Health Ctr. d/b/a Chi Lakewood Health*, 365 NLRB No. 10, slip op. at 3 (Dec. 28, 2016) (Miscimarra, dissenting).

More generally, the Regional Director’s Decision applies an array of doctrines and evidentiary principles to avoid a finding of supervisor status, even when the record contains uncontroverted and unrebutted evidence of Section 2(11) authority. These principles are irreconcilable with the Act and should be reconsidered and abandoned by the Board, as discussed further below.

## **II. BACKGROUND**

The petitioned-for unit involves a group of 18 System Operators who have overall responsibility for the management of ACE’s electrical system, covering roughly 547,000 customers in New Jersey. (Tr. 13-14). The System Operators work in a central control room 24 hours a day, 365 days a year to monitor the electrical grid. As discussed further below, they make critical decisions about staffing, safety, and resource allocation to both protect employees and to keep customers safely supplied with power.

On February 14, 2017, the International Brotherhood of Electrical Workers Local 210 (the “Union” or “Local 210”) filed a representation petition in Case No. 04-RC-193066 seeking an *Armour-Globe* election<sup>6</sup> to determine whether the System Operators wanted to join an existing unit of approximately 375 operation, production, and maintenance employees. The Board conducted a one-day hearing on February 28, 2017 in Philadelphia, during which the Company and the Union presented evidence on whether the System Operators are supervisors within the meaning of Section 2(11) of the Act.<sup>7</sup> The Regional Director issued a Decision and Direction of Election on March 17, 2017, concluding that the System Operators are not supervisors. On March 27, 2017, the NLRB conducted an election in which the System Operators voted against representation by the Union.

On June 1, 2018, the Union filed another petition for an *Armour-Globe* election involving the System Operators in Case No. 04-RC-221319. Rather than hold another hearing, the parties stipulated to the facts contained in the testimony and exhibits from the prior hearing.<sup>8</sup> The Regional Director issued a Decision and Direction of Election on June 15, 2018 adopting the prior 2017 decision. On June 25, 2018, the Region conducted an election in which the System Operators voted in favor of joining the existing unit represented by the Union.

### **III. FACTS**

ACE operates, maintains, and controls the transmission and distribution of electricity to over half-a-million industrial, commercial, and residential customers in New Jersey. (Tr. 13;

---

<sup>6</sup> See *Armour & Co.*, 40 NLRB 1332 (1942); *Globe Machine & Stamping Co.*, 3 NLRB 294 (1937).

<sup>7</sup> Other issues discussed at the hearing are not the subject of this Brief on Review.

<sup>8</sup> In response to ACE’s Request for Review, the Union submitted an opposition brief (“Opposition”) that contended the Company had waived its right to seek review. See Opposition (filed July 30, 2018), at 3. As detailed in ACE’s August 1, 2018 reply to the Union’s Opposition (“Reply”), this waiver argument has no merit and we assume that the Board has rejected this argument in granting the Request for Review. To the extent the Union continues to make this argument in its brief on review, the Company reiterates and incorporates the points made in its Reply brief here.

15). Electricity generated by the power plants is routed through a transmission system (known as the “transmission side” or “transmission work”) to an electrical substation. There, the voltage is converted to a lower voltage via a transformer so that it can be used by the consumer.<sup>9</sup> It then moves through the distribution system (the “distribution side” or “distribution work”), which routes power to electric customers. (Tr. 15; 19; 185). Both the transmission and distribution systems are managed through a central ACE control room, which has overall responsibility for the management of the electric system. (Tr. 15).

System Operators work within the control room to manage the electric system. There are typically four or five System Operators on a shift, along with around three dispatchers, a position that is part of the existing Local 210 bargaining unit. (Tr. 163-64). The record establishes the System Operators report in to shift manager, Jay Davis, who testified he is in the office about 50-55 hours a week. (Tr. 163; 213). On nights and weekends, the System Operators work without other supervision and do not need to a shift manager to make decisions. (Tr. 210-11; 213; 218). In other words, “[o]ut of a 168-hour week, for the other [approximately] 120 hours the highest level individual would be a senior system operator in the room.” (Tr. 218). Thus, for 70% of any given week, System Operators serve, without other supervision, as the highest level authority in the control room. (Tr. 218).

The System Operators are responsible for both maintaining the system, and also directing switching to isolate parts of the system (*i.e.*, deenergizing portions of the grid by opening and closing circuit breakers and switches) so that work can safely be completed by the approximately 300 field employees on a typical shift. (Tr. 18; 133; 164). System Operators control the electric

---

<sup>9</sup> The transmission system carries between 69,000 volts and 500,000 volts. (Tr. 17). The distribution system handles similar work at a lower voltage level.

system to allow other employees to perform construction and maintenance work, to assure grid reliability of the bulk transmission and distribution system, and to restore power to customers as quickly as possible. (Tr. 19-20). In deciding what portions of the system can be taken offline or should be prioritized for repairs, the System Operators must balance multiple factors—including but not limited to—safety, customer demand, whether critical care facilities or other priority customers are impacted (*e.g.*, hospitals), how many field employees are available to be dispatched, the amount of time needed for the repairs, and the integrity of the electric system. (Tr. 28-29; 118; 169-70). They are also responsible for monitoring the stability of the entire system and to take independent actions to prevent against overload and blackouts. (Tr. 19-20).

By way of examples of this work, System Operators decide whether to disconnect large amounts of customers to prevent the system from overloading; whether a field crew or “troublemen” should make a permanent repair or a temporary repair (which determines the length of time a particular crew will be working at a particular location); and how work crews should be allocated, including whether a particular job requires more than one crew. (Tr. 118-123). In other words, the System Operators prioritize work and make decisions about the resulting crew assignments, including deciding whether overtime is needed. (Tr. 152-53). As Michael Sullivan, Vice President of Electric and Gas Operations, testified, “they prioritize what we’re going to do and when will they do it.” (Tr. 119).

System Operators also direct field employees via switching instructions to deenergize a particular piece of equipment. “Switching” is a term for the sequential steps the field crew must take to manually isolate a section of power lines by interrupting the electric flow, which in turn removes the current from the equipment and allows it to be worked on safely. (Tr. 127). The System Operators are responsible for preparation, accuracy, and issuance of clearance orders to

authorize such “switching” work. (Tr. 207-08). Field crews are expected to follow those instructions, and System Operators have accountability for the performance of these instructions. (Tr. 127) (“Q: Are the system operators accountable for the decisions [crews] make? A: Absolutely.”).

Although there are guidelines and training, the System Operators’ work is not bound by rigid rules or approval processes, and they can independently make decisions to protect the system without obtaining approval from their shift manager. (Tr. 126; 174). System Operators may deviate from these guidelines as frequently as once per week, depending on the particular situation encountered. (Tr. 212). Some System Operator guidelines even have an express disclaimer that there may be circumstances where it is “desirable or even necessary to deviate from these guidelines at the [S]ystem [O]perator’s discretion or at the discretion of PJM.” (Tr. 172; E. Ex. 5, at 1).<sup>10</sup> Neither field supervisors nor the dispatchers or field crew have authority to override what the System Operators indicate they need in terms of priority or staffing resources. (Tr. 138; 244-45; 247-49).<sup>11</sup> These other positions lack the “situational awareness” of a System Operator, who alone has the best knowledge and skill to make the right judgments to ensure the reliability of the power grid. (Tr. 247).

Some of this work is planned and other work requires an emergency response. On so-called “blue sky” days, the Company focuses on expanding, maintaining, and generally operating the electric system. (Tr. 16). The System Operators will decide, for example, the right time of day to take a piece of equipment offline for routine maintenance and to ensure the work can be

---

<sup>10</sup> The System Operators are also responsible for interfacing with PJM, a regional transmission organization that coordinates the movement of electricity across 13 states. (Tr. 146-48).

<sup>11</sup> An exception to this rule exists for safety issues. Any individual at ACE can stop any job or refuse to do any work as a result of safety concerns. (Tr. 146).

performed safely and will not cause overloads on other circuits. (Tr. 129-31). Even on clear days, unexpected developments can arise (*e.g.*, hot weather or an unexpected outage of another piece of equipment), and the System Operators can and do make independent, real-time decisions balancing the integrity of the system and the need for maintenance, including cancelling a planned outage for the day. (Tr. 131; 175-76; 178; E. Ex. 8).<sup>12</sup> They can also independently deny requests for new projects or work if, in their judgment, the work cannot be accommodated. (Tr. 176-77; E. Ex. 7). Shift Manager Jay Davis testified that System Operators cancel work roughly every 3-4 weeks. (Tr. 215).

When bad weather impacts the grid, the System Operators will free-up, prioritize, and allocate field resources to do restoration work for outages. (Tr. 16-17). In those settings, System Operators have to take quick, independent action to protect the security of the grid. (Tr. 19). They must prioritize safety and the reliability of the electrical grid in deciding where and when to assign field employees. (Tr. 118-19). They are, for example, responsible for ensuring customers with outages receive attention, and they also must manage the system to avoid blackouts or cascading outages due to the burden on the rest of the system. (Tr. 19-20). They have authority to assign additional crews and authorize overtime as needed to address these responsibilities. (Tr. 120; 152-53; 159).

Once the System Operators prioritize the work, the ACE dispatchers (who are included in the existing bargaining unit) will actually effectuate the dispatch of the work to the field in accordance with the decisions made by System Operators. (Tr. 134-35). For smaller outages, the dispatchers themselves can allocate crews to do work, but when there are decisions to be

---

<sup>12</sup> In contrast, bargaining unit members must inform the System Operators if they cannot do a job due to lack of material or equipment. (Tr. 207).

made about the prioritization of work and the allocation of resources in an outage, those decisions can only be made by the System Operators. (Tr. 137). In either case, the System Operators make the decisions about what work will be assigned and in what order.

#### **IV. ARGUMENT**

The Board should reverse the Regional Director's Decision because the Decision's factual findings and legal conclusions are both clearly erroneous. First, the Regional Director ignored relevant facts and failed to consider the entire record, which when taken as a whole, establishes that System Operators can and do exercise supervisory authority to assign and responsibly direct other ACE employees, using independent judgment. Second, the Regional Director cites in rote fashion earlier utility industry decisions, applying them in an inappropriate manner that reflects a significant departure from the Board's existing standards. Indeed, the legal conclusions reached by the Regional Director contradict the very factual findings made in the Decision based on uncontroverted and unrebutted evidence of Section 2(11) authority. Finally, these standards, as applied by the Regional Director, are irreconcilable with the Act and should be reconsidered to the extent they permit the absurd result reached by the Regional Director, as discussed further below.

##### **A. The Regional Director's Decision Must Be Reversed Because System Operators Have the Authority to Assign Employees**

###### **1. The Regional Director Erred As a Matter of Fact**

The record and the Regional Director's own findings and credibility determinations overwhelmingly demonstrate the System Operators are supervisors under Section 2(11) of the Act. Section 2(3) of the Act excludes any individual employed as a supervisor from the definition of an "employee," and Section 2(11) of the Act defines a "supervisor" as

any individual having the authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign,

reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

29 U.S.C. § 152(11). Because the statutory indicia set forth in Section 2(11) of the Act are stated in the disjunctive, the possession of *any one* of the indicia is sufficient to confer supervisory status. *Arlington Masonry Supply, Inc.*, 339 NLRB 817, 818 (2003).

The Board defines assignment as the act of assigning employees to a place (*e.g.*, department or location), to a time (*e.g.*, shift or overtime), or giving “significant overall duties” or tasks to employees. *Oakwood Healthcare, Inc.*, 348 NLRB 686, 689 (2006). If individuals use independent judgment to assign other employees to a place, a time, *or* significant overall tasks, that person is a statutory supervisor. At ACE, the System Operators do all three.

a.        *Location*

First, the System Operators are responsible for determining whether it is necessary to dispatch a field crew or troublemen to a particular *location* for repairs. In short, they have overall responsibility for balancing competing work priorities, particularly in response to real-time changing conditions during an outage, and they are solely responsible for prioritizing those competing needs. As the Regional Director recognized, the System Operators “make priority decisions about where to place resources, which might entail dispatching field employees” from one outage to another. (Decision, 11). They “may determine, based upon their assessment of conditions on the system that it is necessary to dispatch a field crew or troublemen to a location for repairs, and may even have input into how best to utilize field employees based upon their relative expertise . . . .” (Decision, 15). But because the Regional Director concluded that System Operators effectuate these assignments through the field supervisors, the Decision erroneously found that the System Operators do not “assign” the work. (Decision, 16).

As the full record demonstrates, however, the System Operators prioritize work at different locations to be completed by the field crews. The System Operators can and do require additional crews to be dispatched to a particular site and move crews from different geographic parts of the service territory to get more resources to a particular location, or reassign particular field employees to other locations based on circumstances “on the ground.” (Tr. 120; 123; 126; 247). The System Operators may also work with the field supervisors to decide which crew is best for particular projects, based on their qualifications and skills. (Tr. 137-38). As the Union’s own witness admitted on cross-examination, the System Operators can, for example, direct specific employees to go to a particular job or project. (Tr. 240-41) (acknowledging that System Operators have the authority to tell a particular employee that a specific job or project needs to be addressed next). The Regional Director failed to consider or weigh this dispositive evidence.

The Regional Director further found that when there is a disagreement over the assignment of a particular field crew, the System Operators have the authority to direct and override the judgment of the field supervisors. (Decision, 11; *see also* Tr. 138; 245; 247-49). As the record demonstrates, this authority resides with the System Operator because they are in the best position to understand how to prioritize work over the entire electrical grid:

HEARING OFFICER MANN: Would a field supervisor not know on their own that they can go get a crew elsewhere?

[JAY DAVIS]: It has been my experience that previously that sometimes they are reluctant to do so. Field supervisors, in fact, they lack the situational awareness that a [S]ystem [O]perator has. And they may find that this piece of equipment or this line outage may not require—in their judgment may not be integral to the reliability of the power grid. However, the [S]ystem [O]perator has that knowledge and skill, and they are in a better position to make that judgment.

(Tr. 247).

When evaluating the System Operator’s authority to override the directives of a field supervisor, the Regional Director inappropriately disregarded this evidence of the System Operators’ supervisory authority, concluding “the record is unclear as to how often or in what circumstances this has occurred.” (Decision, 11). In so holding, the Regional Director ignored extant Board law that Section 2(11) of the Act requires only possession of authority to carry out an enumerated supervisory function—not its actual exercise. “It is the existence of the power which determines whether or not an employee is a supervisor.” *Arlington Masonry Supply, Inc.*, 339 NLRB at 818 (citing *NLRB v. Roselon S., Inc.*, 382 F.2d 245, 247 (6th Cir. 1967)); *see also Mountaineer Park, Inc.*, 343 NLRB 1473, 1474 (2004) (“Significantly, it is not required that the individual have exercised any of the powers enumerated in the statute; rather, it is the existence of the power that determines whether the individual is a supervisor.”); *Pepsi-Cola Co.*, 327 NLRB 1062, 1064 (1999) (rejecting Regional Director’s distinction between those individuals that had exercised supervisory authority and those that had not yet done so); *see also NLRB v. Prime Energy Ltd. P’ship*, 224 F.3d 206, 210 (3rd Cir. 2000) (“Once the existence of supervisory authority is established, the degree or frequency of its exercise is of little consequence.”) (citation omitted).

Section 2(11) of the Act “does not require the exercise of the power described for all or any definite part of the employee’s time. It is the existence of the power which determines the classification.” *In re The Pearson Bros Co.*, 199 NLRB 1179, 1181 (1972) (citing *Ohio Power Co. v. NLRB*, 176 F.2d 385, 388 (6th. Cir. 1949)); *see also Chi LakeWood Health*, 365 NLRB No. 10, slip op. at 3 (Miscimarra, dissenting) (“[T]he Board should not disregard unrebutted

evidence ‘merely because it could have been stronger, more detailed, or supported by more specific examples’”) (internal citation omitted).<sup>13</sup>

Here, the absence of frequent disagreements between field supervisors and System Operators does not prove that the System Operators have only “sporadic” supervisory authority. (Decision, 5). Instead, it reflects that field supervisors—who are excluded from the unit as supervisors—ultimately must accede to the authority of the System Operators. Indeed, the absence of frequent disagreements between field supervisors and System Operators is attributable to the fact that the System Operators’ ultimate authority to make these decisions is well-understood. As shift manager Davis explained:

It’s uncommon because they [i.e. the field supervisors] shouldn’t be refusing system operation’s request to get work done. . . . [T]hey understand that when we ring that bell to get a piece of equipment back in service, that it is for a legitimate reason.

(Tr. 249). The System Operators must ultimately have this central and final authority to make decisions concerning the assignment of the employees in the field, particularly in emergency or outage situations, because the field supervisors do not have the same perspective on the needs of the entire system and the prioritization of all of the work that must be performed system-wide. (Tr. 247).

System Operators have this authority and exercise it, as Davis explained, “judiciously.” *See Prime Energy Ltd. P’ship*, 224 F.3d at 210 (“The mere fact that the Regional Director found only one instance where a shift supervisor sent a plant operator home is hardly a reasonable basis to conclude that the authority was lacking. It simply suggests that the authority was rarely

---

<sup>13</sup> Nothing in *Oakwood Healthcare*, *supra*, or subsequent cases compels a different conclusion. To the contrary, the Board in *Oakwood* explained that only “[p]ossession of the authority to engage in (or effectively recommend) any one of the 12 supervisory functions listed in Section 2(11) is necessary to establish supervisory status.” 348 NLRB at 688.

needed.”); *Ariz. Pub. Serv. Co. v. NLRB*, 453 F.2d 228, 231-33 (9th Cir. 1971) (finding supervisory authority when no employee ever failed to comply with the purported supervisor’s requests, even though requests may have been “couched in non-demanding terms”).

It defies common sense to hold, as the Regional Director did, that even though the System Operators have authority to determine (and override) the assignments made by field supervisors—who are indisputably statutory supervisors—the System Operators are *not* statutory supervisors. This would create a bizarre line of authority in which bargaining unit employees are supervised by field supervisors who are excluded from the unit, yet the field supervisors must take direction from System Operators who would be included in the same bargaining unit as the field employees, according to the Regional Director’s Decision. *See Buchanan Marine, L.P.*, 363 NLRB No. 58, slip op. at 10 (Dec. 2, 2015) (Miscimarra, dissenting) (identifying three common-sense factors the Board must consider in conducting a realistic appraisal of the statutory indicia set forth in Section 2(11), so as to “avoid conclusions regarding supervisory status that fail the test of common sense”—in other words, “[i]f one accepts the Board’s finding that the disputed employees are not supervisors, does that produce a ludicrous or illogical result . . .”); *Chi LakeWood Health*, 365 NLRB No. 10, slip op. at 3 (Miscimarra, dissenting) (addressing the need for common-sense principles to guide the application of the factors of Section 2(11)); *see also Ariz. Pub. Serv. Co.*, 453 F.2d at 233 (“The effective exercise of authority is nonetheless supervisory though it is passed on through another supervisory employee.”) (citation omitted).

While it is clear that the System Operators, not the field supervisors, possess the *ultimate* authority to make work assignments, the evidence also demonstrates, at a minimum, that the System Operators can “effectively recommend” assignments to the field supervisors. *See Oakwood Healthcare*, 348 NLRB at 688-89 (“It follows that the decision *or effective*

*recommendation* to affect one of these—place, time, or overall tasks—can be a supervisory [assignment].”) (emphasis added). The Board typically interprets “effective recommendation” to mean that the recommended action is taken without independent investigation by superiors. *See Mountaineer Park, Inc.*, 343 NLRB at 1474–76. Here, the System Operators’ decisions to dispatch crews to particular locations and particular times are not subject to further review but must, instead, be followed, even where the field supervisor disagrees. (Tr. 245; 247-49).

b. *Time*

Second, and as already referenced above, the System Operators also assign field employees to work at specific *times*, including the authority to require field crew to work overtime. The Regional Director recognized and credited this testimony, finding that System Operators determine how long field employees work at a particular site. (Decision, 10). In addition, the Regional Director acknowledged that “System Operators may conclude that overtime work is necessary or that certain jobs should be cancelled” but again incorrectly found that because these decisions are effectuated through the field supervisor, no assignment occurs. (Decision, 15).

As the record demonstrates, the System Operators assign field crews to work at specific times in a number of ways. They make decisions to call in employees who are currently off-duty, including by authorizing overtime. (Tr. 152-53). The System Operators also can cancel or postpone projects to another day. (Tr. 131; 175-76; 178; 245; E. Ex. 8).<sup>14</sup> The record further

---

<sup>14</sup> The Decision is misleading in its reference to “permits.” System Operators can deny requests for work regardless of whether a permit is required. (Tr. 210). In those circumstances where the work requires a piece of equipment to be deenergized, the System Operators will both approve the request for that work and also will prepare a permit or “clearance order” that creates the switching instructions to take an area or piece of equipment offline. (Tr. 207-08). Accordingly, the reference in the Decision to scenarios where there was “insufficient time to obtain a permit” (Decision, 11) means that the System Operator determined there was not time to prepare to do the work, or it was not a high enough priority to move other projects. (Tr. 209).

demonstrates that System Operators can authorize overtime for particular employees and crews.

As Michael Sullivan, Vice President of Electric and Gas Operations, testified:

There is planned overtime and scheduled overtime. There is also emergency overtime. If it is expected, the senior system operator or system operator will hold crews over. If they feel they need, they will do it without anybody except working with the crews directly to say you guys got to button this job up; I need you to stay two or three hours to get this work done, because we can't leave it.

(Tr. 159). The Regional Director's conclusion that "System Operators cannot require field employees to stay to finish work" is therefore clearly erroneous. (Decision, 12).

c. *Significant Overall Tasks*

Third, the System Operators assign to field employees significant overall tasks by directing crews to respond to repair situations and by issuing "switching instructions" and "clearance orders" to direct the workers to deenergize and isolate a particular line or equipment to permit work to be completed. (Tr. 127; 207). *See also Oakwood Healthcare*, 348 NLRB at 690 (referencing assigning an employee to restock shelves as an assignment of significant overall task). Those instructions are themselves mandatory. (Tr. 127). The Regional Director's conclusion that crew leaders are the ones "carrying out the switching instructions" does not contradict or even speak to the System Operator's ability to design and assign those tasks. (Decision, 12). Moreover, the Regional Director engaged in no material analysis as to whether the System Operators assign significant overall tasks.

d. *Independent Judgment*

Finally, the System Operators use independent judgment in exercising all of this authority. As with any highly-regulated utility, the System Operators follow guidelines and procedures in assigning work.<sup>15</sup> But as the Board has recognized, "the mere existence of

---

<sup>15</sup> These guidelines establish, for example, the need to prioritize safety issues like downed wires. (Tr. 28-29).

company policies does not eliminate independent judgment from decision-making if the policies allow for discretionary choices.” *Oakwood Healthcare*, at 693. Here, extensive evidence at the hearing established that ACE maintains only general guidelines, and the System Operators regularly—as often as once a week—deviate from the written guidelines on the basis of their own, independent decision-making. (Tr. 28; 212). In fact, at least some of the guidelines contain an explicit disclaimer that “there may be special circumstances that may make it desirable or even necessary to deviate from these guidelines at the system operator’s discretion or at the direction of PJM.” (Tr. 171-72; E. Ex. 5). This is not only Company policy; there are federal regulations requiring System Operators to have the authority to unilaterally implement real-time actions to ensure the integrity of the system. *See, e.g.*, Reliability Standard PER-003-1 (Operating Personnel Credentials), available at <https://www.nerc.com/ layouts/15/PrintStandard.aspx?standardnumber=PER-003-1&title=Operating%20Personnel%20Credentials&jurisdiction=United%20States> (requiring System Operators performing reliability-related tasks to hold NERC certification); NERC Certification Examination, at 2 (Feb. 13, 2017), available at [https://www.nerc.com/pa/Train/SysOpCert/System%20Operator%20Certification%20DL/Transmission%20Operator%20Certification%20Exam%20Content%20Outline\\_Feb\\_2017.pdf](https://www.nerc.com/pa/Train/SysOpCert/System%20Operator%20Certification%20DL/Transmission%20Operator%20Certification%20Exam%20Content%20Outline_Feb_2017.pdf) (reflecting the need for certified operators to “[i]dentify, communicate, and direct actions if necessary to relieve reliability threats and limit violations”).

Given all of this evidence, the Regional Director correctly concluded that System Operators must exercise independent judgment as part of their job duties:

System Operators are charged with the difficult task of directing the operation of the Employer’s distribution system and protecting its integrity, taking into account concerns for both individual and societal safety and security while constantly balancing needs and risks. They perform their duties by monitoring and prioritizing resources in conjunction with PJM and other regulatory authorities.

To assist them, they employ a computerized energy management system and over 150 written guidelines detailing how to address issues which may occur. While the vast majority of their myriad decisions fall within those guidelines, they must occasionally deviate from them and use their professional judgment. But, as the Board stated in *Mississippi Power*, this judgment, which may be based upon their experience, expertise, training, or education, is not supervisory judgment unless it is exercised in relation to one of the 12 indicia of supervisory authority. *Oakwood Healthcare, supra, Mississippi Power, supra, Providence Hospital, supra.*

(Decision, 14-15) (*see also id.* at 10 (noting System Operators deviate from guidelines, “often a weekly occurrence”)).<sup>16</sup>

While the Regional Director correctly concluded that the System Operators exercise independent judgment, his finding that it is not related to any of the 12 indicia of supervisory authority is clearly erroneous. As discussed above, the record evidence demonstrates that the System Operators exercise independent judgment in assigning and responsibly directing the work of field employees and dispatchers.

Specifically, the System Operators exercise independent judgment in prioritizing the work to be performed by field crews and making decisions about the field assignments necessary to perform that work, including deciding whether overtime is needed. (Tr. 152-153; 164). Once the System Operators prioritize the work, ACE dispatchers dispatch the field employees in accordance with the decisions made by the System Operators. (Tr. 134-35). Although there are guidelines and training, the System Operators’ work is not bound by rigid rules or approval procedures, and System Operators can—and often must, as frequently as once per week—

---

<sup>16</sup> To the extent the Decision could possibly be read to conclude that independent “professional judgment” is excluded from the definition of independent judgment required by Section 2(11), that view has been rejected by the Supreme Court. *See Kentucky River*, 532 U.S. at 715 (“What supervisory judgment worth exercising, one must wonder, does not rest on ‘professional or technical skill or experience’?”). As the Supreme Court made clear, it does not matter what “kind” of judgment is used. *See also Oakwood Healthcare*, 348 NLRB at 692 (noting existence of “independent judgment” does not turn on whether the judgment uses professional or technical expertise).

independently make these work assignment and prioritization decisions to protect the system without obtaining approval from their shift manager. (Tr. 126; 174; 212).

The System Operators also exercise independent judgment in responsibly directing both dispatchers and field employees. With respect to field employees, the System Operators exercise independent judgment in directing or redirecting field employees to a particular task or project, as acknowledged by the Union's own witness. (Tr. 241). The System Operators also exercise independent judgment in establishing switching instructions and clearance orders which direct workers to deenergize and isolate a particular line or piece of equipment so that work may be completed. If field crews do not complete work as assigned, or if power otherwise takes too long to restore, the System Operator is the individual responsible. (Tr. 122; 127; 189-93). ("Q: Are system operators accountable for the decisions [crews] make? A: Absolutely."). (Tr. 127).

With respect to the dispatchers, System Operators exercise independent judgment in directing the dispatchers to mobilize additional crews to address customer emergency calls. (E. Ex. 3, at 6). If dispatchers cannot execute the System Operator's instructions, the System Operator is accountable to obtain additional field crew resources to be dispatched by the dispatcher, or to take other action in order to address the issue. (Tr. 128).

The record contains undisputed evidence that—more often than not—System Operators work without *any* other supervision. They are in the control room 24 hours a day, 7 days a week, while higher-level supervision is there only 50-55 hours a week. (Tr. 213). The conclusion that there is a complete absence of supervisory authority in the control room of a power company for extended periods of time—as former Chairman Miscimarra has described it—cannot pass the “common sense” test. *See Chi LakeWood Health*, 365 NLRB No. 10, slip op. at 3 (Miscimarra, dissenting). Instead, the fact that there are no other supervisors in the control room for extended

periods of time further bolsters the conclusion that the System Operators are supervisors. It is well-established that the Board considers the ratio of supervisors to rank-and-file employees and, where the treatment of disputed employees as non-supervisors would create an *unrealistic* supervisor-to-employee ratio, this will support a finding that the individuals are supervisors, at least as secondary indicia of supervisor status. *See, e.g., D&T Limousine Service, Inc.*, 328 NLRB 769, 778 (1999) (holding individual was a supervisor where, if she were not, the employees at the facility would have no on-site supervision); *Essbar Equip. Co.*, 315 NLRB 461, 466 (1994) (holding individual was a supervisor where he received slightly higher wages than field employees and, “[b]ut for him, there would have been no one at the site without any authority”).<sup>17</sup>

Regardless of whether other higher-level supervisors are present, the System Operators must have the unilateral authority to make real-time decisions in order to protect the safety of crews and provide service to over half-a-million customers. (Tr. 19). The System Operators do not need to call for approval to make decisions and there would be no time to do so in emergency situations. (Tr. 174).<sup>18</sup>

---

<sup>17</sup> Additionally, reversal is warranted because the Regional Director erred in his evaluation of the System Operators’ full compensation, concluding that a senior dispatcher earns more than a System Operator “based upon straight time alone, and may earn even more if overtime is included.” (Decision, 17). This conclusion turns a blind eye to undisputed evidence that System Operators are eligible for management-level bonus incentives, which dispatchers are not. (Tr. 156-157). Moreover, that bonus is based, in part, on how well the field resources under the System Operators perform, providing further evidence that the System Operators are accountable for crews working under their direction. (Tr. 160-161). The Decision mentions these bonuses (Decision, 13) but fails to evaluate or otherwise discuss them when examining the impact of the System Operators’ compensation. (Decision, 17). The Regional Director’s narrow focus on straight-time pay to justify the Decision, therefore, was a material error that merits reversal. *See, e.g., Little Rock Hardboard Co.*, 140 NLRB 264, 265 (1962) (considering higher rate of pay as evidence of supervisory status, when compared with the pay of the production employees).

<sup>18</sup> The fact that the shift manager may be on call does not change the fact that System Operators are expressly authorized to take any necessary action to protect the system and can direct work and assignments without notifying the shift manager or receiving prior approval. (Tr., 126, 174, 176).

## 2. The Regional Director Erred As a Matter of Law

In addition to misconstruing or ignoring record evidence, the Regional Director also misapplied the law in concluding System Operators have no authority to assign work. First, the Regional Director inappropriately cites cases holding that routine assignments based on geographic proximity are insufficient to establish independent judgment, despite the fact that the assignments here are undisputedly *not* routine and, instead, require the System Operators to exercise independent judgment and discretion. Second, the Decision fails to recognize that the authority on which it relies—*Entergy Mississippi*, 357 NLRB 2150 (2011) (“*Entergy Mississippi I*”)—was remanded by the Fifth Circuit Court of Appeals. And third, the Regional Director’s decision misapplies the legal standard to the facts here regarding the assignment of overtime.

As to the first point, the Regional Director cites *Entergy Mississippi I* for the proposition that assignments based on geographic proximity were routine and insufficient to establish independent judgment. (Decision, 7, 15). Similarly, the Regional Director cited *NLRB v. NSTAR Electric Co.*, 798 F.3d 1 (1st Cir. 2015), to highlight the lack of supervisory status where the purported supervisors’ decisions were “controlled by detailed instructions and call-out procedures, and typically were geographically driven.” (Decision, 15).

Unlike in *Entergy Mississippi I* and *NSTAR Electric*, the System Operators here are *not* constrained by existing policies or guidelines.<sup>19</sup> Even the Union’s own witness admitted that he exercises independent judgment within the general guidelines. (Tr. 239). As the Regional Director recognized, the System Operators must tackle the “difficult task” of using considerable independent judgment to evaluate “individual and societal safety and security while constantly

---

<sup>19</sup> And as discussed further, *infra* at fn. 20, *Entergy Mississippi* involved dispatcher positions, rather than System Operators.

balancing the needs and risks.” (Decision, 14). The System Operators must consider, weigh, and decide between a multitude of factors, such as safety (*e.g.*, downed wires), the nature of the customers impacted (*e.g.*, critical care facilities or hospitals), and efficiency considerations, as well as impact to the electrical grid itself. (Tr. 19-20; 28-29; 118; 167-70). The System Operators exercise independent judgment in balancing these various priorities and their relative impacts.

Second, the Regional Director failed to recognize that the Board’s decision *Entergy Mississippi I* was **vacated and remanded** in part because the Fifth Circuit concluded that the evidence showed that the dispatchers involved in that case assigned field employees to locations using independent judgment. *Entergy Mississippi, Inc. v. NLRB*, 810 F.3d 287, 297–98 (5th Cir. 2015) (“*Entergy Mississippi II*”). As the Fifth Circuit recognized, prioritizing assignments among simultaneous outages involves independent judgment:

Evidence in the record shows that dispatchers’ judgment about how to allocate Entergy’s field workers is guided by a range of discretionary factors. Dispatchers appear to prioritize outages affecting industrial customers that have special contracts with Entergy. Yet if an outage occurred at night or on a holiday when an industrial customer’s factory was not operating, dispatchers might be expected to prioritize another customer instead. Dispatchers also apparently prioritize outages affecting customers with “special medical needs,” along with prioritizing outages that affect large numbers of residential customers. If simultaneous outages of each type occur, there is no simple rule to guide the dispatcher’s decision in who to help first. In sum, at times, a dispatcher may have to decide whether to send “[his] one crew” to a trouble location “with the most customers on it,” to “the one that’s got the hospital out,” or to “the plastics plant that needs to be picked up.”

Dispatchers apparently weigh other factors as well. There is evidence that they juggle logistical considerations, such as deciding whether a field employee can complete a quick repair at a trouble spot that is along the way to an outage affecting a high-priority client. Dispatchers arguably must also consider whether a particular outage is likely to cause property damage to Entergy’s facilities. And where, for example, an unrepaired outage from the previous

day elevates the risk posed by a new outage, the dispatcher likely re-prioritizes given the facts on the ground.

*Entergy Mississippi II*, 810 F.3d at 297-98. The Fifth Circuit held that the above evidence at least arguably established that the dispatchers assign field employees to places by exercising independent judgment and remanded the case to the Board, which remains pending.

The System Operators at ACE must balance, through the exercise of independent judgment, many of the same factors on which the Fifth Circuit relied, including customer contracts (Tr. 171), critical care facilities (Tr. 28-29), outages that affect large numbers of residential customers (Tr. 168-69), whether to make a temporary or permanent repairs based on competing needs for staffing (Tr. at 119-20), and whether emergency conditions are likely to cause damage to the integrity of the electric system (Tr. 118). The Regional Director credited this testimony, explaining:

System Operators consider the time of day, type of customer, loading, and resources available. Safety and security issues . . . are given top priority. They also work to restore power to the largest number of customer utilizing the fewest resources. System Operators determine what kind of equipment for construction or maintenance can be taken out, when and for how long. They decide whether to disconnect large numbers of customers to protect the integrity of the system and whether to switch loads or perform repairs. **They also determine how resources are allocated, which can impact how long field employees are at a particular jobsite, and the number and type of crews dispatched.**

(Decision, 10) (emphasis added).

Thus, the System Operators at ACE present an even stronger case for supervisory status than the dispatchers in *Entergy Mississippi II*. As the Regional Director found in this case, System Operators make “priority decisions” about where and when to direct field crew based on their independent assessment (Decision, 11), a conclusion not reached in the underlying Board decision in *Entergy Mississippi I*. As Shift Manager Jay Davis testified, “[S]ystem [O]perators

have that ultimate authority to say, yes, it has to get done.” (Tr. 248). Indeed, the Regional Director found that System Operators are accountable when they fail to make these assignments. (Decision, 16) (System Operator was disciplined for failing to assign a new crew to complete a nuclear reactor test).

The Regional Director clearly erred by minimizing this evidence in concluding that System Operators may have some “impact” on the need for overtime, the length of a particular job, or switching instructions used. (Decision, 16). The System Operators do not merely have an “impact” on those decisions. The System Operators are the *final authority* on those decisions, especially in outage or emergency situations. If a System Operator decides that a particular customer, location, or equipment is a priority, that decision alone dictates where the field crew must report to work. (Tr. 245) (explaining the System Operator has the ultimate authority to decide the priority of work). If the System Operators decide to require overtime, field employees must remain on the job. (Tr. 159).

The Regional Director manifestly ignored the law and the record evidence by concluding that because the System Operators effectuate these assignments through field supervisors, the System Operators do not “assign” the work. (Decision 11, 15). In particular, the Regional Director ignored dispositive evidence that the System Operators have the final authority to decide the location, time, and work to be performed by the field employees, even where the field supervisor may disagree. (Tr. 138; 245; 248). The mere fact that those directives may be communicated via a field supervisor or a dispatcher does not in any way diminish the System Operators’ ultimate authority to determine these assignments. *See Ariz. Pub. Serv. Co.*, 453 F.2d at 233 (concluding that it was immaterial that some directions that the putative supervisors issued to field crew were routed through other individuals, and that “[t]he effective exercise of authority

is nonetheless supervisory though it is passed on through another supervisory employee”) (citation omitted).

Moreover, the Regional Director’s efforts to avoid this conclusion by shoe-horning these facts into inapposite cases where independent judgment was lacking is a clear misapplication of existing Board law. (Decision, 15). As noted above, the Regional Director’s citations to *Entergy Mississippi, supra*, for the proposition that assignments based on geographic proximity were routine and insufficient to establish independent judgment, (Decision, 7, 15), and *NSTAR Electric, supra*, to highlight the lack of supervisory status where the purported supervisors’ decisions were “controlled by detailed instructions and call-out procedures, and typically were geographically driven,” (Decision, 15), are misplaced and at odds with substantial record evidence, including the testimony of the Union’s own witness.

Here, the System Operators’ decisions are *not* controlled by geographic proximity or rote application of pre-written instructions. Nor are System Operators constrained by existing policies or guidelines. In fact, unlike the purported supervisors in *Entergy Mississippi I* and *NSTAR Electric*, the System Operators here must constantly balance various priorities and relative impacts in deciding what portions of the system may be taken offline or should be prioritized for repair. (Tr. 19-20; 28-29; 118; 167-70). That System Operators may deviate from general written guidelines on the basis of their own, independent decision-making—as frequently as once per week, depending on the particular situation encountered—is not even a matter of dispute, as the Union’s own witness *admitted* that he changes work plans and deviates from standard operating procedures. (Tr. 238-39). This is clear, undisputed evidence of independent judgment, which the Regional Director inappropriately disregarded.

Third, and finally, the Regional Director misapplied *Entergy Mississippi I* in finding that the System Operators do not have authority to assign overtime. In *Entergy Mississippi I*, the Board concluded that the employer failed to present sufficient evidence of the authority to require overtime, finding that the testimony was speculative, lacking in specificity, and insufficient. *Entergy Mississippi*, 357 NLRB at 2156.

Here, in contrast, evidence regarding the System Operators' ability to authorize overtime or cancel planned work is far from speculative. (Tr. 152-53; 159; 244-45; 247-49). In fact, as the Regional Director found, System Operators have been *disciplined* for failing to hold workers over or failing to bring in a new crew after an existing crew "time[s] out." (Decision, 12) ("For example, the Employer provided evidence of one instance in which a field crew 'timed out' and the System Operator did not bring in another crew. . . [resulting in] a 'verbal censure[.]'"); Tr. 189-90). The record also establishes that the System Operators can require the field employee's direct supervisor to mandate assignments, even over the field supervisor's objection. (Tr. 245; 247).<sup>20</sup> As at least one other Regional Director has correctly recognized, "what is important in the instant case is the fact that the [individuals] have the authority to make the actual decision to have employees work overtime . . . . In this respect, [they] act much like higher level management which may decide the necess[ity] of working overtime and the numbers of employees needed, but leaving to lower level supervisors the determination of the specific employees to be assigned the overtime." See Decision and Order, Case No. 13-RC-20619 (Aug. 6, 2001), available at <https://www.nlr.gov/case/13-rc-020619>. The fact that the field supervisor may need to *effectuate* that decision does not detract from the fact that the System Operator has

---

<sup>20</sup> The Decision's conclusion that "System Operators cannot require field employees to stay to finish work" is therefore incorrect. Although the System Operator may need to go through an intermediary, the System Operators have the "ultimate authority" when disagreements in the field arise. (Tr. 247-49).

authority to make the decision. Thus, the Regional Director's Decision should be reversed because the record evidence demonstrates that System Operators have authority to assign overtime, and that they exercise independent judgment in doing so.

**B. The Regional Director's Decision Must Be Reversed Because System Operators Have the Authority to Responsibly Direct Employees**

While the evidence on any one indicia of supervisory status is sufficient to reverse the Regional Director's Decision, the Decision should be reversed also based on the evidence concerning the System Operators' responsible direction of other employees. Under the Act, "responsibly direct" includes instructing employees on how to perform jobs properly and in what order. *See In re Croft Metals, Inc.*, 348 NLRB 717, 722 (2006) (finding leads "instruct employees how to perform jobs properly, and tell employees what to load first on a truck or what jobs to run first on a line to ensure that orders are filled and production completed in a timely manner"). The purported supervisor must "be accountable for the performance of the task by the other [employee] such that some adverse consequence may befall the one providing the oversight if the tasks . . . are not performed properly." *Oakwood Healthcare*, 348 NLRB at 691-92. At ACE, the System Operators responsibly direct both the control room dispatchers and the field crew employees.

1. **The Regional Director's Decision Cannot Stand in Light of the Record Evidence**

Here, and as noted above, the System Operators create step-by-step switching instructions for field crews and redirect them to handle specific tasks, particularly in an outage, and they are held accountable for how they direct field crews in carrying out their duties:

Q Can you give an example of what a switching instruction would entail?

A Say you're at a small substation. You might have to isolate a piece of equipment, a transformer, place grounds, put tags

on. There's a whole set of instructions that they would do, that they would go through to make a piece of equipment safe, isolated so that it can be worked on. Just as an example, switching instructions are things that the senior operators -- or the senior system operators or the system operators would provide.

Q Are crews expected to follow those instructions?

A They are.

Q Are system operators accountable for the decisions they make?

A Absolutely.

Q In what way are they accountable?

A They are part of -- they have a performance accountability system that we have for all the management employees. They are rated on their performance in reliability and safety, cost efficiency, all those kinds of areas.

(Tr. 126-27). If crews do not complete work as assigned, or if power otherwise takes too long to restore, the System Operator is the individual responsible. (Tr. 122; 189-93). Indeed, as referenced above, the Union's own witness acknowledged that he has the ultimate authority to direct an employee to a particular task or project. (Tr. 241). And as the Regional Director recognized, the System Operators also conduct field audits to confirm that this "switching and tagging" work is being handled accurately. (Decision, 12; Tr. 184-86).

Contrary to this record evidence, the Regional Director found that the System Operators fail to responsibly direct field crews because there was insufficient evidence that System Operators are held accountable for field crew or dispatcher errors. (Decision, 12). In so holding, the Regional Director again ignored significant record evidence. The Company presented dispositive testimony that the System Operators' performance and compensation are both impacted by the performance of the field crews they direct. (Tr. 127; 186-87; 218-19; E. Ex. 9)

(discussing performance reviews); (Tr. 156-57; 160-61) (discussing bonuses, which include a metric for regional/field performance). For example, as part of the performance accountability system, the Company evaluates whether the System Operators have fewer than 25 “permit and tag errors” by the field crew in the System Operator’s region. (Tr. 186-87; E. Ex. 9, at 2 of 9).<sup>21</sup> The form makes clear that such field crew errors are separate and apart from accountability for the System Operator’s own errors, for which they have a threshold of *zero* incidents. (*Id.*). The Company also presented additional evidence not mentioned in the Decision whatsoever, including an example where the field crew erred by failing to contact the System Operator before proceeding with “switching” work, which resulted in verbal coaching of the System Operator. (Tr. 192; 204 E. Ex. 10). Finally, as discussed above, the absence of discipline reflects only that employees recognize the System Operators’ authority and do not refuse their directions. *Prime Energy Ltd. P’ship, supra*; *Ariz. Pub. Serv. Co., supra*.

The Regional Director further failed to weigh or evaluate evidence that the System Operators responsibly direct the control room dispatchers. Per the Union’s testimony, ACE and Local 210 were involved in negotiating job descriptions for the ACE dispatcher positions under Local 210’s jurisdiction. (E. Ex. 3, at 4, 6). Those job descriptions reflect that dispatchers mobilize additional workforce and recommend or initiate corrective action to address customer emergency calls *under the direction of the System Operator*. (E. Ex. 3, at 6). Such job descriptions are relevant to the determination of supervisory status, particularly where corroborated by the Union’s own testimony:

Q Did you understand that power system controllers [*i.e.*, System Operators] directed the work of the dispatchers?

---

<sup>21</sup> Permit and tag errors are errors made in the process of deenergizing or reenergizing a piece of equipment.

A I guess I would have to because that's what it says there.

(Tr. 105). *See, e.g., RCC Fabricators, Inc.*, 352 NLRB 701, 707, n.13 (2008) (“Nothing in this line of cases suggests that company-issued job descriptions or titles are irrelevant”); *see also Lakeland Health Care Assocs, LLC v. NLRB*, 696 F.3d 1332, 1345 (11th Cir. 2012) (“Written policies, job descriptions, performance evaluations, and the like, when corroborated by live testimony or other evidence, are obviously relevant to the issue of responsible direction”).

The System Operators, moreover, are also *accountable* for ensuring that those directions are actually followed. (Tr. 128). If the dispatcher cannot execute the System Operator’s instructions, for example, the System Operator is responsible for remedying the situation by obtaining additional field crew resources for the dispatcher or otherwise resolving the issue. (*Id.*). It is beyond dispute that a dispatcher could also have an impact on reliability, safety, and cost efficiency of the grid, all of which impact the System Operators’ performance evaluation and bonus payments. (Tr. 127; 156-57; 160-61; *see also* Decision, 6) (recognizing the inherent impact of dispatcher work on the “well-being and safety of the public and employees”). And as addressed above, the System Operators exercise independent judgment in the course of this work—including but not limited to regular circumstances where there are no other supervisors in the control room. The Regional Director’s failure to account for this evidence of the System Operators’ responsible direction of the dispatchers is itself a serious error that warrants reversal.

2. The Regional Director Misapplied Existing Board Law and Applied an Overly-Narrow Construction of Accountability in Evaluating Responsible Direction

The Regional Director further erred by holding that the System Operators must formally discipline field employees or dispatchers in order to “responsibly direct” them. (Decision, 12) (noting there is no evidence System Operator audits result in discipline to field employees or dispatchers). Such a reading of “accountability” is overly narrow. *See Oakwood Healthcare*,

348 NLRB at 692 (requiring only “the authority to take corrective action, if necessary” to establish responsible direction); *Cnty. Educ. Ctrs., Inc.*, 360 NLRB 85 (2014) (“[T]he threshold of corrective action for purposes of demonstrating responsible direction falls below that of other Section 2(11) indicia, including disciplinary and promotion authority”) (citation omitted). The record clearly demonstrates that System Operators have the authority to “take corrective action” and are responsible for ensuring their priorities and switching instructions are actually carried out. *See, e.g.*, Tr. 128-29 (discussing System Operator responsibilities if field crew are not dispatched as directed).<sup>22</sup> And, as discussed above, the System Operators themselves face material adverse consequences on their performance review and compensation (in addition to actual discipline) if the field crew and dispatchers are not properly managed. The Decision again errs by requiring formal discipline at the System Operator level as well. (Decision, 12). *See Oakwood Healthcare*, 348 NLRB at 692 (requiring only “a *prospect* of adverse consequences for the putative supervisor” arising from his or her direction of other employees to establish responsible direction) (emphasis added).<sup>23</sup> The Regional Director, accordingly, misconstrued and misapplied the law by requiring some undefined volume of formal discipline to establish responsible direction.

C. **Compelling Reasons Support a Return to the Board’s Standard in *Big Rivers***

To the extent the Board concludes that existing law permits the result reached by the Regional Director—which, as discussed above, it does not—compelling reasons exist for a

---

<sup>22</sup> At a bare minimum, the record conclusively establishes that System Operators can effectively recommend discipline for field crew and dispatchers to their supervisors. (Tr. at 153-54) (noting that field crew and dispatchers will be disciplined for failing to follow System Operator instructions, which the System Operator would accomplish through the individual’s supervisor).

<sup>23</sup> Moreover, and as discussed above, the record evidence demonstrates that the System Operators exercise independent judgment in responsibly directing this work.

change in policy. For over 15 years, the Board followed the well-reasoned opinion in *Big Rivers Elec. Corp.*, 266 NLRB 380 (1983), which held that an electric company’s system supervisors (1) responsibly direct work in the execution of switching orders and (2) assign work to field employees.<sup>24</sup> As is particularly relevant here, the Board in *Big Rivers* correctly reasoned that:

The fact that [system supervisors] may communicate through other supervisory personnel, particularly in the initial assignment of work, does not lessen the extent of their authority; nor does the fact that they are located in a facility which is some distance from the work being performed and have no visual observation of that work, since they are the ones who issue the orders and are responsible for their proper and safe execution. Moreover, since system supervisors are on duty 24 hours a day, 7 days a week, they often have the sole and complete responsibility for ensuring safe and continuous service to the Employer’s customers, as there are no other supervisory personnel on duty in the power control center on weekends or after regular working hours.

266 NLRB at 383. The Board reached this conclusion following nearly half-a-century of near-unanimity among the federal appellate courts that individuals responsible for monitoring transmission and distribution systems are supervisors. *See, e.g., Ariz. Pub. Serv. Co.*, 453 F.2d at 233 (holding the “system load supervisors (‘SLDs’)” at issue were supervisors, concluding it was immaterial that some directions the SLDs gave field crew were routed through other individuals or couched in non-demanding terms); *NLRB v. Detroit Edison Co.*, 537 F.2d 239, 244 (6th Cir. 1976) (concluding that dispatchers were supervisors because they “have the discretion and

---

<sup>24</sup> The *Big Rivers* line of cases involve positions with job titles that vary across companies, including “dispatchers,” “dispatch supervisors,” and “system supervisors.” Although these positions vary, they share responsibility for conveying switching instructions to field crew and are involved in calling out crews during outages or other emergencies. While the Company therefore discusses the relevant portions of those decisions, it is significant to note that the System Operators are distinct from the dispatchers at ACE. Instead, the System Operators are responsible for a broader geographic area and a broader array of responsibilities and discretion. (Tr. 116). Whereas the dispatchers can independently allocate crew resources as needed where there are available resources, it is the System Operators that must make decisions about prioritization issues where resources are limited. (Tr. 137). Therefore, as noted above, cases that find utility dispatchers lack supervisory authority because they rely on pre-established protocols or computer systems are inapplicable to System Operators, regardless of whether there is any change in the law. *See, e.g., Entergy Mississippi II, supra.*

responsibility, in fact, to weigh these various alternatives, determine the best course of action, initiate the orders to the various operating personnel in the field to carry out these orders, and then finally to see that the orders are, in fact, duly discharged and carried out”); *S. Ind. Gas & Elec. Co. v. NLRB*, 657 F.2d 878, 886 (7th Cir. 1981) (denying enforcement and commenting: “if these employees are not supervisors, then the Company’s entire electrical system operates without any supervision in the evenings, on weekends, and in emergencies”) (citation omitted).<sup>25</sup>

In 1999, the Board suddenly reversed course and overruled *Big Rivers*, holding that although the distribution dispatchers and system dispatchers at issue may rely on “critical judgment” based on their expertise, know-how, or formal training; such judgment “does not, without more, constitute the exercise of supervisory judgment.” *Miss. Power & Light Co.*, 328 NLRB 965, 970 (1999) (citing *Providence Hosp.*, 320 NLRB 717, 725 (1996)).<sup>26</sup> The Board majority in *Mississippi Power & Light* found that the distribution and system dispatchers were merely “quasi-professional or quasi-overseer employee[s]” rather than true supervisors. *Id.* at 971. The majority speculated—without any specific citation—that the Board in *Big Rivers* “may have been swayed by the complexity of the dispatchers’ responsibilities and the adverse consequences to the well-being, safety, and lives of the public and employees that might result from...faulty decisions regarding switching sequences.” *Id.* at 969. The majority ultimately concluded that the dispatchers are governed by preexisting rules or by commonsense

---

<sup>25</sup> See also *Me. Yankee Atomic Power Co. v. NLRB*, 624 F.2d 347 (1st Cir. 1980) (denying enforcement of *Maine Yankee Atomic Power Co.*, 243 NLRB 319 (1979)); *Monongahela Power Co. v. NLRB*, 657 F.2d 608 (4th Cir. 1981) (denying enforcement of *Monongahela Power Co.*, 252 NLRB 715 (1980)); *W. Penn Power Co. v. NLRB*, 337 F.2d 993 (3rd Cir. 1964) (vacating the certification and denying enforcement of *W. Penn Power Co.*, 143 NLRB 1316 (1964)).

<sup>26</sup> The Board’s decision in *Mississippi Power & Light* leaves little room for dispute about the extent of its departure from the longstanding and well-tested rationale of *Big Rivers*. Indeed, the Board in *Mississippi Power & Light* conceded that, under the standard set forth in *Big Rivers*, the dispatchers at issue in *Mississippi Power & Light* would have been found to be statutory supervisors, having determined that the factual differences between the cases were “legally insignificant.” 328 NLRB at 968.

considerations when assigning priorities and that their role in calling-in additional employees is limited to relaying those requests to other dispatchers or on-call supervisors. *Id.* at 973. With respect to their involvement in issuing the switching sequences, the majority concluded that the judgment involved is “a function of the dispatchers’ own work, based on their training, knowledge, and experience and does not constitute the exercise of independent supervisory judgment.” *Id.* at 974.

Soon after *Mississippi Power & Light*, however, the U.S. Supreme Court overruled one of the foundations of the Board’s rationale, rejecting the notion that the use of professional and technical judgment is excluded from the definition of “independent judgment” for purposes of determining supervisory status. *See Kentucky River*, 532 U.S. at 714-16 (calling the Board’s construction a “startling categorical exclusion” and commenting: “[i]f the Board applied this aspect of its test to every exercise of a supervisory function, it would virtually eliminate ‘supervisors’ from the Act”).<sup>27</sup>

Recognizing the fatal blow of *Kentucky River* to the logic of *Mississippi Power & Light*, two federal circuit courts quickly refused to accept *Mississippi Power & Light* as valid authority. The Tenth Circuit in *Public Service Co. of Colorado v. NLRB*, 271 F.3d 1213 (10th Cir. 2001), explained that the Board’s decision in *Mississippi Power & Light* “specifically trace[d] the standard that it applie[d] to the line of charge nurse cases overturned by *Kentucky River* [*Community Care*].” 271 F.3d at 1220 (citations omitted). Similarly, the Fifth Circuit in *Entergy Gulf States, Inc. v. NLRB* affirmed its view that the Board’s decision in *Big Rivers* remained the appropriate standard by which to assess the supervisory status of utility industry dispatchers.

---

<sup>27</sup> The Union’s attempt to rely on *Mississippi Power & Light* is therefore unpersuasive. *See* Opposition, at 4.

253 F.3d 203, 205, 208, 210 (5th Cir. 2001) (noting “neither the facts nor applicable law has changed since the NLRB declared [utility industry dispatchers] to be supervisors in 1983”).

Following the Supreme Court’s decision in *Kentucky River*, the Board again revisited the issue of supervisory status. In *Oakwood Healthcare*, 348 NLRB at 686, the Board clarified the meaning of several terms contained in Section 2(11) of the Act. Contrary to its conclusion in *Mississippi Power & Light* that utility industry dispatchers’ exercise of judgment based on professional experience or expertise did not constitute independent judgment for purposes of supervisory status, the Board in *Oakwood Healthcare* clarified that independent judgment *includes* judgment exercised as a result of an employee’s professional expertise and experience, as long as that judgment is exercised, as here, in connection to one of the 12 indicia of supervisory authority. 348 NLRB at 693-94.

Despite the Supreme Court’s decision in *Kentucky River*, the Board refused to return to the *Big Rivers* standard in 2011. Without any significant discussion, the majority summarily rejected a return to that standard:

Contrary to the Employer, we believe that a reversion to *Big Rivers*, *supra*, a case predating *Oakwood Healthcare* by over 20 years, is unwarranted. The former case was decided under a different standard for determining supervisory status than the one set forth in *Oakwood Healthcare* pursuant to the Supreme Court’s guidance in *Kentucky River*. For the Board to revert to a standard that does not follow the principles set forth in *Oakwood Healthcare* would ignore the significant doctrinal developments in this area of law. We therefore reject that approach and apply the *Oakwood Healthcare* standard to the facts of this case.

*Entergy Mississippi*, 357 NLRB at 2154 (concluding under *Oakwood Healthcare* that the employer failed to establish that the dispatchers in that case were statutory supervisors).<sup>28</sup>

---

<sup>28</sup> Although the Board majority believed that a return to *Big Rivers* “would ignore the significant doctrinal developments in this area of law,” a return to *Big Rivers* would actually be consistent with the most important doctrinal development, the Supreme Court’s decision in *Kentucky River*.

As member Hayes pointed out in a sharp dissent, the majority’s conclusion in *Entergy Mississippi* relies on an overly narrow reading of *Oakwood Healthcare*. See 357 NLRB at 2158 (Hayes, dissenting) (“As expressed in *Oakwood Healthcare*, the critical inquiry is whether the person delegated authority to direct and oversee the performance of a task by other employees is accountable for the employees’ success or failure in accomplishing the task for the employer. . . . *Oakwood Healthcare*, however, does not require that an ‘adverse consequence’ must be some formal discipline or even that every incident must result in an adverse consequence”) (citation omitted). And as the Fifth Circuit highlighted in its 2015 remand to the Board, the majority in *Entergy Mississippi I* simply ignored evidence that the dispatchers in that case “assign” field employees to various places using independent judgment when balancing between competing outage demands. *Entergy Mississippi II*, 810 F.3d at 297-98.

**D. Compelling Reasons Support Abandonment of the Board’s Restrictive Principles Regarding Supervisory Status, and Adoption of Principles that Would More Fairly Reflect the Requirements of Section 2(11)**

To the extent the Board concludes that the Regional Director’s Decision here is required by *Oakwood Healthcare*, the Board should recognize—as former Chairman Miscimarra has explained—that the Board’s test for supervisory status has simply become “increasingly abstract” and removed from the “practical realities” of the workplace. As former Chairman Miscimarra explained:

Consistent with the Board’s responsibility to apply the general provisions of the Act to the complexities of industrial life, I believe the Board must recognize that many businesses cannot function, as a practical matter, without having someone—or some reasonable number of people—exercising supervisory authority at a particular facility, during a particular shift, or in relation to a particular function.

*Buchanan Marine, L.P.*, 363 NLRB No. 58, slip op. at 4 (internal quotation marks omitted)

(Miscimarra, dissenting). Consistent with the views expressed by former Chairman Miscimarra

in *Buchanan Marine* and other cases, the Board's evaluation of Section 2(11) authority in every case involving disputed supervisory status should include a consideration of three common-sense principles: "(i) the nature of the employer's operations, (ii) the work performed by undisputed statutory employees, and (iii) whether it is plausible to conclude that all supervisory authority is vested in persons other than those whose supervisory status is in dispute." *Id.* See also *Chi LakeWood Health*, 365 NLRB No. 10, slip op. at 3 (Miscimarra, dissenting). Such a common-sense approach here supports the conclusion that the System Operators are supervisors.

The Regional Director's Decision to the contrary is untenable. Moreover, it reveals the Board's increasing reliance on doctrines and evidentiary principles regarding Section 2(11) authority that are irreconcilable with the Act, which preclude a finding of supervisory status even when the record contains dispositive evidence of Section 2(11) authority. This unduly restrictive approach was applied by the Regional Director in this case, whose Decision summarized the applicable doctrines and principles as follows:

The Board analyzes each case in order to differentiate between the exercise of independent judgment and the giving of routine instructions; between effective recommendation and forceful suggestions; and between the appearance of supervision and supervision in fact. The exercise of some supervisory authority in a merely routine, clerical, or perfunctory manner does not confer supervisory status on an employee. . . . The authority effectively to recommend an action means that the recommended action is taken without independent investigation by supervisors, not simply that the recommendation is ultimately followed. . . . The Board has made clear that the proponent's evidentiary burden is significant and substantial, holding that purely conclusory evidence is not sufficient to establish supervisory status. . . .

The Board has an obligation not to construe the statutory language too broadly because the individual found to be a supervisor is denied the employee rights that are protected under the Act. . . . Where the evidence is in conflict or otherwise inconclusive on particular indicia of supervisory authority, the Board will find that supervisory status has not been established, at least on the basis of those indicia. . . . In order to meet the burden of proof, a party must show

specific details and/or circumstances making clear that the claimed supervisory authority actually exists, and is not mere paper authority. . . . The sporadic exercise of supervisory authority is not sufficient to transform an employee into a supervisor. . . .

(Decision, 5).

When Section 2(11) was added to the Act as part of the Taft-Hartley amendments, Congress did not include any of the above qualifications in the definition of supervisory status. To the contrary, Congress articulated 12 different types of supervisory authority—any *one* of which was to be sufficient to result in supervisory status—and even when *none* of those indicia of supervisory authority existed, Section 2(11) still requires a finding of supervisory status to the extent that an individual has authority “effectively to recommend” such action. Accordingly, the Board should find that the doctrines and evidentiary principles relied upon by the Regional Director are inconsistent with Section 2(11), on its face, and the Board should abandon those principles and overrule those decisions that have articulated and applied them.

Moreover, as noted above, the Board’s decision in *Oakwood Healthcare* does *not* condition responsible direction on proof that putative supervisors have *actually* received discipline based on deficient work performance by subordinate employees. To the extent *Oakwood Healthcare* is interpreted to contain such a requirement, *Oakwood Healthcare* in this respect should be overruled as being irreconcilable with Section 2(11) of the Act, which clearly confers supervisory status based on the “authority” conferred on particular positions, regardless of whether such authority has been exercised, much less whether supervisors have in fact received discipline based on deficient work performance by their subordinates.

Here, ACE does not leave the management of its electrical system unsupervised for a majority of the time, when shift management is not present in the control room. The Company has indisputably demonstrated the need for real-time, rapid-response decisions as a matter of

ACE policy, practical reality, and federal regulations. The System Operators' authority to carry out these essential functions is well-established in the record and largely uncontroverted. The Board should not let the Regional Director's Decision stand in the face of this evidence and these important policy considerations.

**V. CONCLUSION**

For the foregoing reasons, the Board should reverse the Regional Director's Decision and Direction of Election because the System Operators both assign and responsibly direct work using independent judgment and are therefore supervisors under the Act.

Respectfully submitted,

/s/ Jonathan C. Fritts

Jonathan C. Fritts  
MORGAN, LEWIS & BOCKIUS LLP  
1111 Pennsylvania Avenue, NW  
Washington, DC 20004  
Telephone: 202.739.5867  
Facsimile 202.739.3001  
jonathan.fritts@morganlewis.com

Julia S. Sturniolo  
Andrew L. Gniewek  
MORGAN, LEWIS & BOCKIUS LLP  
1701 Market Street  
Philadelphia, PA 19103  
Telephone: 215.963.4782/5319  
Facsimile: 215.963.5001  
julia.sturniolo@morganlewis.com  
andrew.gniewek@morganlewis.com

Dated: January 28, 2019

*Counsel for the Employer*  
*Atlantic City Electric Company*

**CERTIFICATE OF SERVICE**

I, Andrew L. Gniewek, counsel for Atlantic City Electric Company, hereby certify that a copy of the foregoing Brief on Review of the Acting Regional Director's Decision and Direction of Election was electronically filed on the NLRB's e-filing system and served via electronic mail and U.S. mail, upon the following:

Dennis P. Walsh, Regional Director  
National Labor Relations Board, Region 4  
100 Penn Square East, Suite 403  
Philadelphia, PA 19107  
dennis.walsh@nlrb.gov

Kevin D. Jarvis, Esquire  
O'Brien, Belland & Bushinsky, LLC  
1526 Berlin Road  
Cherry Hill, NJ 08003  
kjarvis@obbblaw.com

Sue D. Gunter  
Sherman Dunn, P.C.  
900 Seventh Street, NW, Suite 1000  
Washington, DC 20001  
gunter@shermardunn.com

Dated: January 28, 2019

/s/ Andrew L. Gniewek